IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
STAR SHEWEY,	)	**Case No. 99-21181**
	)	
Debtors.	)	**MEMORANDUM OF DECISION**
	)	
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Stephen B. McCrea, Couer d'Alene, Idaho, for the Debtor.

H. James Magnuson, Couer d'Alene, Idaho, for Ford Elsaesser, Trustee.

This matter comes before the Court on the Trustee's objection to the Debtor's claimed homestead exemption. Testimonial and documentary evidence was presented at hearing on February 15, and post-trial briefing has been submitted. Having evaluated the same, the Court now enters its findings of fact and conclusions of law. Fed.R.Bankr.P. 9014, 7052.

BACKGROUND

Star Shewey, the chapter 7 debtor ("Star") filed her petition for relief on September 29, 1999. She is a widow; her husband Charlie Shewey ("Charlie") died in May, 1999. Star has no dependents. She is unemployed and has no income other

than pension benefits which cover but half her monthly expenses. Schedules B(11), I and J.

Charlie operated a business under the style of Shewey Environmental Management, which provided services related to clean-up of contaminated properties. After he died, Star was left with limited assets, significant liabilities, and no net income.

In 1976, Star and Charlie purchased on contract sixty acres of property in Bonner County, Idaho. Star represents that the contract was paid off in 1979. This property consists of two contiguous parcels. The larger parcel (#463203, according to the records of the Bonner County Assessor) is fifty-five acres in size. The smaller parcel (#529169), on which Star's residence is located, is five acres. The larger parcel is undeveloped, and apparently has been used in conjunction with the smaller parcel by Star and Charlie since acquired in 1976.

When Star filed her petition, she listed the sixty acres of real property described above as an asset. Schedule A. She indicated her interest was that of a "contract purchaser" of this property, and alleged that the property was worth $250,000. *Id.* She indicated that the property secured obligations of $213,300, and it appears she was here referring to debts owed creditors Home Coming Financial ($131,000) and US Bank ($82,300). *Id.*, *see also* Schedule D. The security for these two creditors is also described on Schedule D as "debtor's residence" and is asserted to be worth $250,000.

Schedule D also refers to an obligation owed Robert Hemme ("Hemme") for $21,300, secured by "55 acres of debtor's real property." Star alleges that this property securing Hemme's interest is worth $90,000. *Id.* However, Schedule A doesn't disclose any separate $90,000 property in addition to the $250,000 parcel, nor does Schedule D separately describe it. Schedule D does state, in regard to the nature of Hemme's claim: "Lien: deed in lieu of mortgage & vehicles." *Id.*[1]

Rounding out the initial bankruptcy disclosures is Star's claim of a homestead exemption on Schedule C in the amount of $36,700. This figure is in apparent reference to the $250,000 residence net of the secured claims of Home Coming Financial and US Bank. The legal description on Schedule C is identical to that on Schedule A.[2]

The Trustee objected to this claim of exemption, alleging that the property was divided into two separate parcels and that the exemption should be allowed only on the five acre parcel containing Star's residence.

Before that objection came on for hearing, Star filed a motion to avoid a certain judgment lien under § 522(f) as impairing her exemption. In that pleading, she again alleged her property was worth $250,000 and was encumbered by the Home Coming

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[1] As illuminated at hearing, and discussed at length below, Hemme received a 1995 (quitclaim) deed allegedly "in lieu" of a mortgage, and this deed covered fifty-five of the sixty acres.

[2] The description on both schedules is: S1/2 NW1/4 SE1/4 & SW1/4 SE1/4 all in Sec. 8, T54N, R5W BM, Bonner County, Idaho. The Court's analysis indicates that this describes the sixty acre parcel comprised of both Parcel # 463203 and Parcel # 529169.

Financial and US Bank liens. But she also here referred to "an additional encumbrance on the property in the amount of $21,300 to Robert Hemme."

Trial of the issues raised by the Trustee's objection shed additional light on this situation.

In 1995 Charlie sought a loan from his friend and business acquaintance, Hemme, to support the operation of his business. Hemme agreed to loan Charlie and Star $40,000 on the condition that he be given some collateral or other security for repayment of the funds.

To satisfy this condition, the Sheweys gave Hemme and another individual, Robert Beck,[3] a quitclaim deed on April 6, 1995. That deed recites that it conveys "60 Acres, 4 Bedroom, 3 Bathroom, Ranch House" in Blanchard, Bonner County, Idaho. The legal description on this deed, however, described only fifty-five acres out of the sixty acre property set forth in the bankruptcy schedules.[4] Hemme testified that he thought, initially, that he received a deed to all sixty acres but later learned that the legal description limited the transfer to the fifty-five acre parcel.

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[3] For purposes of simplicity, the Court will refer to both grantees in the singular (i.e., as "Hemme") in this decision.

[4] The deed description was "S2NWSE, E2SWSE, SWSWSE, S2NWSWSE, Bonner County" which the Court reads as S1/2 NW1/4 SE1/4, E1/2 SW1/4 SE1/4, SW1/4 SW1/4 SE1/4, S1/2 NW1/4 SW1/4 SE1/4. The Court calculates that this encompasses fifty-five acres, and matches the boundaries of Parcel #463203 as shown on Exhibit 1. The sixty acre description, set forth earlier and as taken from Schedule A, appears consistent in dimension and boundary with Parcel #463203 and Parcel #529169 combined.

Despite becoming the record owner of this property, Hemme testified that it was his intent to return the property to the Sheweys once (and if) the debt was paid in full. Hemme testified further that this arrangement gave him greater security than a mortgage would have, since he would never need to institute foreclosure proceedings to obtain the land if the debt was not repaid. Consistent with his ownership interest in this parcel, Hemme has paid all real property taxes on this land since the time he received title in 1995. With the exception of the quitclaim deed, there are no documents concerning this transaction.

This initial loan was not paid back[5] and Charlie continued to borrow money from Hemme for his business. Hemme testified that Charlie's total indebtedness at the time of his death, four years after the initial loan, was approximately $200,000.

After Charlie's death, Star and Hemme reached another oral agreement, this time regarding the amount which would be considered secured by the fifty-five acres. This amount was set at $96,300[6] and would need to be paid in order to satisfy the loan obligation and obtain reconveyance of the fifty-five acres. As with the initial and subsequent transactions between the parties, no writing memorializes this 1999 agreement.

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[5] Testimony indicated there was an initial repayment term of ninety days on the $40,000 loan.

[6] Hemme at one point testified that it was his understanding that all obligations of Charlie were secured by the deeded property. Yet, he also agreed with Star to the $96,300 figure even though significantly more was owed at Charlie's death. Whether this was a special accommodation to Star, or simply evidence of the informal and ill-defined nature of the financial arrangement is not clear.

In partial satisfaction of this new compromised amount, Star obtained $75,000 from US Bank secured by a second mortgage on the five acre parcel on which she resided,[7] and paid it to Hemme in June 1999, leaving a $21,300 balance.[8]

ISSUES PRESENTED

As noted, Star has claimed a homestead exemption on her Bonner County property. Idaho Code Section 55-1001, *et seq.* Her Schedule C description would lead to the conclusion that she claims the exemption on the entire sixty acres. So, too, does her § 522(f) motion. However, her characterization of a $36,700 equity available for exemption would lead, in light of the assertions on Schedule D, to the conclusion that she omitted the Hemme debt of $21,300 from her calculation of equity.[9] To rectify this, her post-hearing brief claims total debts of $235,600 exist as liens on sixty acres worth $250,000 resulting in an equity of $14,400.

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[7] The first mortgage on the five acre parcel totals $132,000 and the second, to US Bank, is listed on the schedules at $82,300. Star represents that she borrowed the $75,000, used to pay Hemme, against a pre-existing secured line of credit with US Bank. None of the Home Coming or US Bank documents were introduced.

[8] Hemme is listed as a secured creditor on Star's Schedule D with a claim of $21,300. The response to question 3(b) on the statement of affairs discloses generally the June 1999 transaction of Star with US Bank and Hemme and also a separate payment to Hemme of $15,000. An amended statement was filed after hearing which reflected the $75,000 payment as well.

[9] Schedule D appears to indicate that the fifty-five acres is, alone, worth $90,000. This would make the five acre parcel worth $160,000 in order to reach Star's $250,000 value for the entire sixty acres. The Trustee submitted assessor's printouts reflecting a value of $112,592 for the five acres and $110,000 for the fifty-five acres.

The Trustee objected to this exemption. As noted, he originally contended that the parcels were severable and the exemption was only proper upon one. As of the hearing, the Trustee contended that Star didn't own the larger parcel, and therefore could not assert an exemption in it.

DISCUSSION

Debtors before this Court are authorized to claim Idaho statutory exemptions, including a homestead exemption. *In re Koopal*, 226 B.R. 888, 890, 98.4 I.B.C.R. 98, 99 (Bankr. D. Idaho 1998) citing *In re Millsap*, 122 B.R. 577, 579, 91 I.B.C.R. 5, 7 (Bankr. D. Idaho 1991). *See also*, § 522(b); Idaho Code §§ 11-609, 55-1001 through 1011.

Idaho Code § 55-1001(2) provides:

> "Homestead" means and consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated and by which the same are surrounded, or improved; or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. . . . Property included in the homestead must be actually intended or used as a principal home for the owner.

When these conditions are met, the Idaho Code provides for an automatic exemption of up to $50,000 of equity in the property. § 55-1003, 55-1004. It is well established that the homestead exemption statutes are to be liberally construed in favor of the debtor. *Koopal*, 226 B.R. at 890, 98.4 I.B.C.R. at 99; *In re Peters*, 168 B.R. 710, 711, 94 I.B.C.R. 44 (Bankr. D. Idaho 1994); *Millsap*, 122 B.R. at 579, 91

I.B.C.R. at 7.[10] The Trustee bears the burden of proving the exemption is improper. Fed.R.Bankr.P. 4003(c).

The parties, upon the above facts, suggest competing scenarios. In the first, which is urged by the Trustee, Star no longer retained any interest as owner of the fifty-five acre parcel after April 1995. Hemme owns it. Star can claim no exemption in the larger parcel as she has no ownership interest in it. If this approach is accepted, Star can claim an exemption only in the smaller five acre parcel. It is worth approximately $160,000 (or $112,592 according to the assessor). That parcel is encumbered by $214,300 in debt. Star thus has no equity to exempt.

In the second scenario, Star is the equitable owner of the fifty-five acre parcel even though she and Charlie were no longer its record owners after the transfer of title to Hemme in 1995. Her "ownership" flows from a view of the quitclaim deed as in effect no more than an equitable mortgage notwithstanding its apparently absolute form. If she so owns the entire sixty acres, and if it is worth $250,000 as asserted in Star's schedules and pleadings, with total debts against the property of $235,600

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[10] Star's counsel unearthed *Ellicot v. Hall*, 3 Idaho 421, 31 P. 796 (1892), a venerable decision which in addressing this exemption principle said:

> We prefer the broad humanity of the "Cowboy Law" to the cold and technical construction which would make the intended beneficence of the law a mockery and delusion, and take the bread of the soldier and the wage earner from the mouths of his wife and children to glut the maw of an insatiate creditor.

31 P. at 797.

($214,300 plus Hemme's $21,300), Star is left with an equity of $14,400 which would be exempt.[11]

Equitable mortgage

Star's argument is that she is entitled to claim a homestead exemption on all sixty acres of the Bonner County property because the transaction between Hemme and her husband constitutes an equitable mortgage rather than an absolute transfer.

The test to determine whether an absolute conveyance is actually an equitable mortgage was set forth in *Credit Bureau of Preston v. Sleight*, 92 Idaho 210, 440 P.2d 143 (1968) which states:

> Concerning the issue of whether the deed, absolute on its face was, in fact, a mortgage, this court in *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933), specified with great care and particularity the criteria to be applied in determining whether a deed, absolute upon its face, is in fact a mortgage; namely, (a) existence of debt to be secured; (b) satisfaction or survival of the debt; (c) previous negotiations of parties; (d) inadequacy of price; (e) financial condition of grantor; and (f) intention of parties.
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> While all these factors are to be considered, the controlling test to be applied is whether the grantor sustains the relation of debtor to the grantee after the execution of the instrument. *Clinton v Utah Constr. Co.*, 40 Idaho 659, 237 P. 427 (1925). A mortgage is an incident of the debt, and without a debt there can be no mortgage. *Hawe v. Hawe*, 89 Idaho 367, 406 P.2d 106 (1965); *Shaner v. Rathdrum State Bank,* 29 Idaho 576, 161 P. 90 (1916).

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[11] To the extent this scenario were to be adopted, and the Trustee continued to object to the exemption of the larger contiguous parcel, the Court would be forced to overrule the objection. The Trustee has not sustained his burden in proving that the properties are not jointly used, and this Court has previously ruled that the value limits on the exemption control any abuse in such contiguous property situations. *In re Millsap*, 122 B.R. at 581, 91 I.B.C.R. at 7. *See also, In re Crumley*, 95 I.B.C.R. 8,9 (1995); *In re Taylor*, 95 I.B.C.R. 74, 76 (1995).

92 Idaho at 216, 440 P.2d at 149. *See also, Christensen v. Nelson,* 125 Idaho 663, 873 P.2d 917 (Ct. App. 1994)*; Kreiensieck v. Cook*, 108 Idaho 657, 701 P.2d 277 (Ct. App. 1985).

The burden under Idaho law is on the party who asserts that a deed, absolute on its face, is actually a mortgage. That party must show by "clear and convincing" evidence that a mortgage was intended and not a transfer with a right to repurchase. *Credit Bureau,* 92 Idaho at 216, citing *Clontz v. Fortner*, 88 Idaho 355, 399 P.2d 949 (1965). Parol evidence is admissible for the purpose of showing that a conveyance of land, absolute in form, is in fact a mortgage. Idaho Code § 45-905.

Here there is an absence of any writing memorializing or explaining the financial transactions between Hemme and the Sheweys. The construction Star urges is based solely on her testimony and that of Hemme. That testimony does not indicate that Star directly participated in or knew the details of many of the financial transactions between Charlie and Hemme, except insofar as she executed the 1995 quitclaim deed and had negotiations in 1999 with Hemme over the "payoff" after Charlie died. Her testimony is accordingly given limited weight.

Hemme's testimony is the only real evidence -- other than the quitclaim deed itself -- of the nature of these transactions and the intent of the parties. While the Court finds Hemme generally credible, his testimony was at times vague and little detail was provided as to the exact terms of the parties' agreements.

The record is ultimately equivocal in regard to the *Preston* factors. A debt arose contemporaneously with the transfer in 1995. A debt obligation, though not just

the original 1995 amount, survives to this day. Testimony also indicated that there was discussion about securing the obligation for the benefit of Hemme. These factors would support the construction of the transfer as a equitable mortgage.

However, Hemme's testimony that no foreclosure would ever be required in the event of default and the absence of any terms and conditions surrounding the loan transaction(s) cut against it.

The inadequacy of a $40,000 "price" for an absolute transfer of the fifty-five acres cannot be determined on this record. While it appears inadequate given current valuations of the property, nothing established the market value of the property at the time of its 1995 transfer to Hemme.

According to the testimony, the financial condition of the Sheweys in 1995 was weak, and they had no ability to obtain funds other than through the Hemme "mortgage." But the Sheweys had allegedly paid off the underlying contract on the entire sixty acres, and its value would be available for a traditional mortgage. Even after the 1995 quitclaim, the Sheweys kept control of their five acre parcel which contained the residence. This property was in fact used as security for loans from two other creditors.

The evidence regarding intention of the parties is also equivocal. While there has been testimony that both sides to the transaction treated it as a loan secured by the property, Hemme admitted that he wished to obtain title to the Sheweys' property rather than a mortgage and that, by receiving it, he was given greater protection than he would have received through a grant of a security interest. He candidly

acknowledged that he wished to avoid any issues surrounding mortgages including specifically the need to foreclose in the event that Charlie failed to repay the debt. Hemme also paid the taxes on the property from the time he obtained title to it. These facts stand strongly against Star's position.

Additionally, if this was an equitable mortgage, there is no clear evidence of any terms of the credit, i.e., the amount secured, future advances, repayment terms, interest rate, and so on. The Court cannot from this record find a meeting of the minds on essentially any of the necessary, fundamental terms of a lending transaction. Even if the 1999 negotiations are considered as *post hoc* evidence of the parties' intent that a loan was contemplated in 1995, there still are no concrete terms as to that obligation other than a "secured" amount due, now, of $21,300. This impacts whether an equitable mortgage should be found, as well as obviously affecting enforcement of such an obligation.

After carefully analyzing the record and the *Preston* factors the Court concludes that the property was, in fact and effect, absolutely conveyed to Hemme subject only to an unwritten right of Star and Charlie to seek its reconveyance if these ever-changing debts were paid. Thus, Hemme became the owner of the fifty-five acre parcel, subject only to an unwritten agreement to transfer in the future on the satisfaction of certain, ill-defined conditions. Star has failed to establish that an equitable mortgage exists.[12]

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[12] The Court has reached this conclusion utilizing a preponderance of the evidence standard, though it could be argued that Star should be compelled to meet (continued...)

A second, related issue now must also be addressed. Even though the Court has concluded that there is no equitable mortgage, did the Sheweys retain enough of an interest given their post-1995 possession of the fifty-five acres with Hemme's consent, in order to assert a homestead exemption?

Possessory and Equitable Interests

To claim a valid homestead exemption, the debtor must be the "owner" of the property. *See* § 55-1001(2), § 55-1002. Idaho Code § 55-1001(4) provides: "Owner includes, but is not limited to, a purchaser under a deed of trust, mortgage or contract."

In re Fullerton, 92 I.B.C.R. 22 (Bankr. D. Idaho 1992) discussed the concept of "ownership." In *Fullerton,* the debtor and her brother had been devised equal interests in their mother's residence through the operation of a will. The debtor was granted permission by her brother to reside at this residence. Subsequently, the debtor incurred major medical bills from the illness and death of her husband which forced her to file for bankruptcy relief. Despite debtor's possessory and equitable interests in the property at the time of her bankruptcy filing, she did not have title. However, the debtor still claimed a homestead exemption on this property to which the trustee objected.

The Court, recognizing that Idaho's homestead exemptions were to be liberally construed in the debtor's favor, reasoned that Fullerton qualified as the "owner" for

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[12](...continued)
the clear and convincing evidence standard required by Idaho precedent.

purposes of claiming a homestead exemption based upon the debtor's possessory interest in the property, in conjunction with her equitable interest derived from her mother's will. 92 I.B.C.R. at 22.

Although *Fullerton* is instructive, it is distinguishable. While Charlie and Star apparently had possession of the undeveloped fifty-five acre parcel adjacent to their residence, their "equitable" interest is far less certain than the devise in *Fullerton*. And the public record contradicts any retained interest in favor of the Sheweys following the transfer of title to Hemme in 1995.[13]

Star hasn't established equitable ownership on these facts. Her right to possession or use of the fifty-five acres at Hemme's sufferance, or the alleged right to seek reconveyance, may support a chose in action or a personal right that would become property of her estate under the expansive reach of § 541(a)(1), but that is not equivalent to an ownership interest in the real property.

[13] In *Fullerton*, title was still in the mother's name. Her estate was still in probate. The public record would there lead directly to the debtor and her brother. Here it would lead to Hemme.

CONCLUSION

Based on the record presented, the Court does not find that Star is the "owner" of the fifty-five acre parcel of land and she is not entitled to claim a homestead exemption upon that parcel. Hemme received title to this property, paid taxes on it, and held it subject only to the Sheweys' unwritten right to continue to possess or use it at Hemme's sufferance. The Court rejects the proposition that Star owns this parcel and that Hemme's interest is an equitable mortgage. Therefore, the Court will sustain the Trustee's objection to the claim of homestead exemption to the extent that it includes this land.

This conclusion does not effect Star's ability to claim a homestead exemption upon the remaining five acre parcel of which she is the record owner. It appears her exemption on this parcel is properly claimed. § 55-1001, § 55-1002. Given this parcel's apparent value from the existing record ($112,000 to $160,000) and the debt against it ($214,300), there is no equity and no practical benefit to the exemption. While the exemption of the property is valid, § 55-1003 limits the amount of the exemption to the net value of the property up to a maximum of $50,000. There is, on the record presented, no net value for the Debtor in this parcel. The Trustee's objection shall, for this reason, be sustained and the exemption disallowed.

An appropriate order shall be prepared by the Trustee.

Dated this 26th day of April, 2000.